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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ANDRE ISLAND, Plaintiff and Appellant, v. FEDEX FREIGHT, INC., et al., Defendant and Respondent; TAMIKO LOYD et al., Plaintiffs and Respondents.	B285643 (Los Angeles County Super. Ct. No. JCCP4788)

APPEAL from orders of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

Wilshire Law Firm, PLC, Daniel B. Miller for Plaintiff and Appellant.

Yukevich & Cavanaugh, James J. Yukevich, Todd A. Cavanaugh, and Nina J. Kim for Defendant and Respondent.

Dermot Givens for Plaintiffs and Respondents.

* * * * * *

After a traffic accident took the life of a 29-year-old man, three people sought to sue for his wrongful death—his grandmother who raised him, his biological mother who occasionally provided him support, and his biological father who had been in prison all but one year of the man's life. The trial court ruled that the biological mother had standing to sue for wrongful death, but the biological father did not. The biological father challenges that ruling as well as the court's denial of his motion for reconsideration. We conclude there was no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The Accident*

On April 10, 2014, a Federal Express tractor-trailer crossed the center divider of the Interstate 5 freeway in northern California and struck a bus carrying prospective college students and alumni chaperones. Several people lost their lives; one of them was 29-year-old Michael Myvett, Jr. (Michael).[1]

B. *Michael's parentage and upbringing*

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1 Because several of the involved parties have the same last names, we use first names for clarity. We mean no disrespect.

Michael was born in March 1985. His birth certificate listed Tamiko Loyd (Tamiko) as his mother and Michael Myvett, Sr. as his father. DNA tests confirmed that Michael's father was Andre Island (Island). Island was convicted of murder soon after Michael was conceived and served the next 28 years of his life in prison.

Michael grew up in the household of his maternal grandmother, Debra Loyd (Debra). Debra became Michael's legal guardian in 1990, when he was five years old. Debra ended up paying for most of Michael's upbringing, although Tamiko occasionally bought him school supplies, clothes and shoes. Debra and Tamiko gave conflicting accounts as to whether Tamiko lived in the household, but Tamiko periodically spent time with Michael as he was growing up.

II. Procedural Background

A. *Competing claims for wrongful death*

Debra, Tamiko and Island each sued Federal Express and Silverado Stages, Inc., (the bus owner) for wrongful death.[2] Where, as here, a person dies without a spouse or any children, the pertinent statutes empower the decedent's parents to sue for wrongful death unless they abandoned the child during his minority, as defined in Probate Code section 6452.[3] (Civ. Proc. Code, § 377.60; Prob. Code, §§ 6402, subds. (b) & (d), 6452.)

B. *Litigating standing to sue for wrongful death*

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2 Debra also sued for survivor benefits, but that claim is not at issue in this appeal.

3 All further statutory references are to the Probate Code unless otherwise indicated.

Debra, Tamiko and Island signed a stipulation agreeing to a briefing schedule and evidentiary hearing to determine who could sue for Michael's wrongful death.

1. *Briefing and evidentiary hearing*

In declarations attached to her briefs and through testimony at the hearing, Debra presented evidence that she was the only one to contribute to Michael's upbringing and that Island never provided any financial support to Michael.

In declarations attached to his briefs and through testimony at the hearing, Island presented evidence regarding his financial support of Michael—namely, that (1) he "contributed to [Michael's] support when possible"; (2) he would send money for Michael's benefit through Tamiko and through others; (3) the amount he would contribute "depend[ed]" and could be a "couple hundred" or "[f]ew hundred sometimes"; and (4) Tamiko once received $800 from him to use for her first-month's rent. Island also presented evidence regarding his communications with Michael—namely, that (1) he regularly asked Tamiko and Debra how Michael was doing when Michael was under 18 years old; (2) Michael once spent a weekend with Island's relatives when Michael was 13 years old; (3) Island "regularly communicated" with Michael; (4) Michael both *did* and *did not* visit Island in prison while Michael was an infant; (5) Michael wrote letters to the parole board on Island's behalf in 2003 (just after Michael turned 18) and 2006 (when Michael was 21), and the 2003 letter stated that Michael and Island "talk[ed] once a week" and that they had a "strong bond"; and (6) Michael and Island would visit after Island was released from prison to a halfway house. Island also submitted letters purportedly sent by Tamiko and Debra to the parole board on his behalf, although Debra denied submitting

any such letters, and Island acknowledged that Debra's signature on two of the letters was "different."

2. *Trial court's ruling*

The trial court ruled that Island did not have standing to sue for Michael's wrongful death because Island had "failed to provide any support [to] and to communicate [with Michael] . . . for the . . . period" "prescribed" in section 6452.[4] The court found Island's testimony, based on its content and his demeanor, to be "self-serving, illogical and obviously improvised"; on that basis, the court found the testimony to be "unbelievable" and "rejected" it "in its entirety." The court also disbelieved Tamiko's testimony that Island had given her $800.

3. *Motion for reconsideration and relief*

Island thereafter filed a timely motion for reconsideration of the trial court's ruling on standing under Civil Procedure Code section 1008. He also requested relief from that ruling under Civil Procedure Code section 473, on the ground that Island and his attorney were justifiably surprised by (1) Debra's argument that Island lacked standing under section 6452, because they believed the sole issue presented was whether Island was Michael's biological father; and (2) Debra's testimony that she did not send any letters to the parole board. Island sought to reopen the evidentiary hearing.

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4 The court rejected Debra's argument that Tamiko had abandoned Michael within the meaning of section 6452 because the evidence showed that Tamiko supported and communicated with Michael during his minority. We affirmed the ruling regarding Tamiko in *Loyd v. Loyd*, (Nov. 29, 2018, B285512) [nonpub. opn.]).

Island submitted several documents in support of his motion. He submitted a declaration from his counsel purporting to take the blame for "not anticipat[ing] that abandonment" under section 6452 "would be at issue." Island also submitted an updated declaration that largely reaffirmed the statements in his prior declaration except to (1) provide additional details on which of his family members had passed along Island's money to Tamiko to use for Michael's support, and (2) upgrade the frequency of his communications with Michael from "regular" to "constant." To bolster his statements, Island submitted (1) declarations from a few of his family members attesting that they had given money to Tamiko for Michael and that Island "had demonstrated that [he and Michael] had communicated on a regular basis"; (2) a print-out showing a $300 withdrawal from Island's prison account shortly before Michael's eighteenth birthday (but with no further detail on how it was used); (3) an undated birthday and father's day card from Michael to Island; and (4) a letter from Michael to the parole board in 2000 (when Michael was 15) stating that he had "talked to [his] father and written him trying to develop a relationship with him." Island additionally submitted a declaration from a handwriting expert who opined that Debra's signature on the letters to the parole board matched other samples of Debra's signature.

4. *Ruling on motion for reconsideration and relief*

The trial court denied Island's motion. The court denied the motion for reconsideration because Island's standing to sue under section 6452 had been raised prior to the hearing such that Island could not have been "surprised" by Debra's claim, and Island thus provided no "satisfactory explanation for failing to produce his supposedly new evidence" at the prior hearing. The

court denied the motion for relief because Island's attorney's "failure to understand the type of response required or to anticipate which arguments would be found persuasive [did] not warrant relief."

C. *Appeal*

Island filed a timely notice of appeal.

DISCUSSION

Island argues that the trial court erred in (1) ruling that he lacked standing to sue for wrongful death due to section 6452, and (2) denying his motion for reconsideration. We review the standing question for substantial evidence (*San Luis Rey Racing, Inc. v. California Horse Racing Bd.* (2017) 15 Cal.App.5th 67, 73), except that we independently interpret the statutes governing standing (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247). We review the denial of a motion for reconsideration for an abuse of discretion. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1338.)

I. Ruling on Standing

By statute, the "heirs" of a deceased person may sue "for the loss of companionship and for other losses suffered [by those heirs] as a result of [the] decedent's death." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263; Code Civ. Proc., §§ 377.60-377.62.) Where, as here, a decedent dies without any "surviving spouse, domestic partner, children, [or] issue of deceased children," the wrongful death statute confers standing to sue for wrongful death on "the persons . . . who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60; *Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1185.) The law of intestate succession specifies that where a person dies without a surviving spouse or

descendants, his property—and, as incorporated into the wrongful death statutes, standing to sue for wrongful death—goes to "the decedent's parent or parents equally" (§ 6402, subd. (b)) unless section 6452 specifies otherwise (§ 6452, subd. (b)).

As pertinent here, a parent loses his right to inherit property (and thus to sue for wrongful death) if the parent "[(1)] left the child during the child's minority [(2)] without an effort to provide for the child's support or without communication from the parent, [(3)] for at least seven consecutive years [(4)] that continued until the end of the child's minority, [(5)] with the intent on the part of the parent to abandon the child." (§ 6452, subds. (a)(3) & (b).) Under this provision, "[t]he failure to provide support or to communicate for the prescribed period is presumptive evidence of an intent to abandon." (*Id.*, subd. (a)(3).)

The second element specifies that a parent loses his right to sue for wrongful death if he *either* (1) did not make "an effort to provide for the [decedent's] support" "*or*" (2) did not "communicat[e] with the [decedent]" for the last seven years of the decedent's minority. This reading is dictated by the plain text of section 6452 because it separates these two requirements with the word "or"—not "and." (Accord, *Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 79 ["Ordinarily, the word 'and' connotes a conjunctive meaning, while the word 'or' implies a disjunctive or alternative meaning."].) This reading is also confirmed by the statute's legislative history: "[I]n order to inherit from a child, a parent who has intentionally abandoned a minor for more than [seven] years must both financially support the child *and* communicate with the child." (Sen. Judicial Com. Rep., Assem. Bill No. 490, (2013-2014, Reg. Sess.) as amended May 23, 2013, p. 5), available at

http://www.:leginfo.ca.gov/pub/13-14/bill/asm/ab_0451-0500/ab_490_cfa_20130603_135138_sen_comm.html (italics added); see also Concurrence in Sen. Amen., Assem. Bill No. 490, p. 4 ["The bill provides that parents will be disinherited if, with the intent to abandon their child, they left the child and without an effort to support or to communicate with the child, or both, for at least seven years that continued until the end of the child's minority."], available at http://www.leginfo.ca.go/pub/13-14/bill/asm/ab_0451-0500/ab_490_cfa_20130613_164015_asm_floor.html.

Substantial evidence supports the trial court's finding that Island did not make "an effort to provide for" Michael's support during the last seven years of Michael's minority. The sole evidence that Island ever provided such support was Island's and Tamiko's testimony, and the trial court explicitly and resoundingly rejected their testimony on this point as not credible. Because our review for substantial evidence requires us to "review the record in the light most favorable to the" trial court's findings (*King v. State of California* (2015) 242 Cal.App.4th 265, 278) and, more to the point, does not permit us to reweigh credibility determinations except in very unusual situations (*People v. Prunty* (2015) 62 Cal.4th 59, 89), we must defer to the trial court's credibility findings. This leaves no evidence of Island's financial support and hence presumptive evidence of his intent to abandon Michael. Debra's testimony that Island never provided any financial support while Michael lived in her home also supports the trial court's finding.

Island levels two broad challenges against the trial court's reasoning.

First, he contends that we must overturn the trial court's findings even under substantial evidence review. To begin, Island asserts that the trial court was wrong to reject his testimony as not credible because a court may do so only if there is a conflict in the evidence; here, Island continues, there was no conflict because Debra's evidence that he did not support Michael did not refute his testimony that he *did* support Michael through payments made directly to Tamiko (rather than to Debra). We reject this assertion because a trial court "'may reject *in toto* the testimony of a witness, even though the witness is uncontradicted'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890); no conflict is necessary. Substantial evidence review also requires us to draw all reasonable inferences in favor of the court's findings (*King*, *supra*, 242 Cal.App.4th at p. 278-279), and we may reasonably infer that Debra—as the person who paid the bills for Michael—would know if she had fewer bills to pay due to financial support from Island.

Further, Island correctly notes that a trial court's finding that a witness was not credible at most "'remove[s] that testimony from the evidentiary mix'" but does not constitute "'affirmative evidence of a contrary conclusion.' [Citation.]" (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 518.) From this, he argues that the trial court's finding that he was not credible does not erase Tamiko's testimony that Island gave her $800. This argument ignores that the trial court specifically rejected Tamiko's testimony on this point as not credible. That the trial court did not reject Tamiko's testimony about the degree of communication between Island and Michael does not matter because the absence of any effort to provide financial support is enough, by itself, to divest Island of standing

to sue for wrongful death. This evidence of communication between Island and Michael also does not rebut the presumptive intent to abandon: If it did, section 6452 would effectively require proof of *both* no effort to provide financial support *and* no communication; however, as explained above, the statute's plain language makes the absence of *either* disqualifying.

Second, Island contends that section 6452 cannot divest him of standing because his incarceration during Michael's entire minority excuses him from any obligation to support or communicate with Michael and rebuts the presumption of intent to abandon. For support, he cites language from section 6452's legislative history indicating that "[a] parent who was in jail or unemployed or otherwise could not afford to support his or her child can simply rebut the presumption of intent to abandon by showing that he or she did not have the ability to support the child but had no intention to abandon the child." (Concurrence in Sen. Amend., Assem. Bill No. 490, *supra*, pp. 4-5; Assem. Com. on Judiciary, Assem. Bill No. 490, p. 5 [same], available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0451-0500/ab_490_cfa_20130401_111405_asm_comm.html; Sen. Judiciary Com., Assem. Bill No. 490, *supra*, p. 5 ["Because the abandonment must be intentional, a parent who is involuntarily institutionalized or who is performing military service would not be disinherited."].)

We reject Island's argument that section 6452 does not apply at all to "incarcerated" parents or that incarceration automatically rebuts the presumptive intent to abandon that arises from non-support or non-communication. The statute's plain text spells out no such effect, and that text controls over language found in the legislative history. (*Olson v. Automobile*

Club of Southern California (2008) 42 Cal.4th 1142, 1151 ["courts must analyze a statute's plain language, and may look to the legislative history underlying a statute's enactment only if the plain language is ambiguous"].) Looking to section 6452's legislative history does not lead to a different result. Although that history contains some comments that could be read to endorse an absolute exception for incarcerated parents, the bulk of the history simply acknowledges that incarcerated parents may have an easier time showing that their lack of financial support or communication was not due to an intent to abandon. This is of little assistance to Island because he testified that he provided financial support and communication *notwithstanding* his incarceration, and the trial court rejected that testimony as not credible.

II. Ruling on Motion for Reconsideration

A party may seek reconsideration of a court order "based upon new or different facts, circumstances, or law." (Civ. Proc. Code, § 1008, subd. (a).) To prevail on such a motion, the party must meet this statutory threshold *and* provide a "'satisfactory explanation for the failure to produce that evidence at an earlier time.' [Citation.]" (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342.)

The trial court did not abuse its discretion in concluding that Island had not provided a "satisfactory explanation" for not contesting the applicability of section 6452 at the initial hearing. In her initial, pre-hearing brief, Debra argued that "Island Does Not Have Standing To Be A Plaintiff In The Wrongful Death Action of Michael Myvett, Jr."; cited section 6452, subdivision (a)(3); and argued that Island "did not contribute any support during Michael's lifetime." In her pre-hearing reply brief, Debra

argued that "[e]ven if . . . Island can establish himself as the natural parent[,] he ignores Probate Code section 6452" and criticized Island's evidence of "provid[ing] [Michael] support." In his response to these findings, Island declared that he "provide[d] . . . resources" to Michael and "regularly communicated" with him. Because Debra raised the applicability of section 6452 prior to the hearing and because Island's response tracked the key elements of section 6452, subdivision (a)(3), we conclude the trial court had ample reason to find that Island had been put on notice of section 6452's applicability prior to the hearing.

Island raises three arguments in response.

First, he asserts that the scope of the hearing had been narrowed by the lead liaison counsel who, in setting forth how the hearing would proceed procedurally, explained that Island would be testifying first and that the court could "make a determination whether . . . Island has standing as the biological father." This explanation could not limit the substantive scope of the issues joined in the prior briefing. But even if it could, liaison counsel went on to leave the hearing open-ended, stating: "[E]ach of the lawyers will have an opportunity to cross-examine, with the court's permission, [the prospective wrongful death] plaintiff[s] to bring out whatever issues they think [are] relevant regarding standing."

Second, Island contends that the scope of the hearing was not clear because the trial court said it "misunderstood" Debra's case after Debra argued, in closing, that Island did not have standing under section 6452. However, the court's expression of misunderstanding regarding Debra's argument at the end of the hearing does not have any effect on what Island should have known the issues would be at the outset of the hearing. As

explained above, the pre-hearing briefs raised the applicability of section 6452 as a distinct issue.

Third, Island argues that the trial court was wrong to rely upon Island's failure to conduct discovery because the parties' stipulation for resolving the issue of standing did not expressly refer to discovery. Because Debra's filings put him on notice of the section 6452 issue, we need not consider whether discovery would have put him on further notice.

DISPOSITION

The orders are affirmed. Federal Express and Debra are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ